No. 20744

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking Association, as Trustee, *Appellant,*

vs.

THE CROWN LIFE INSURANCE COMPANY, a Corporation, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT
United States District Judge

OPENING BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is a civil action in contract commenced by the appellant, SEATTLE - FIRST NATIONAL BANK, a national banking association organized and existing under the laws of the United States of America, against the appellee, THE CROWN LIFE INSURANCE COMPANY, an alien Canadian corporation, for recovery of the sum of $288,017.52, together with interest thereon, in accordance with the terms and provisions of a life insurance policy (Ex. 2) issued by appellee and under which appel-

lant was and is the named beneficiary. (Clerk's Transcript of Record, pages 1-21; herein referred to as Clk. R. 1-21). The action was filed by appellant on February 11, 1963 in the United States District Court for the Western District of Washington, Southern Division. (Clk. R. 1). It is a civil action between a citizen of the United States and a citizen of a foreign state wherein the matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000 (Clk. R. 43). The United States District Court had jurisdiction of the action under and by virtue of 28 U.S.C.A. Section 1332(a)(2). Following trial of the action before the Honorable George H. Boldt, sitting without a jury, a judgment of dismissal was entered on December 13, 1965 (Clk. R. 66) from which an appeal was taken by appellant on January 11, 1966 (Clk. R. 67). The appeal was filed and docketed in this Court on January 31, 1966 and February 15, 1966, respectively. This Court has jurisdiction to review the judgment in question under and by virtue of 28 U.S.C.A. Sections 1291 and 1294(1).

STATEMENT OF THE CASE

Statement of Facts

As appears from the record herein, substantially all of the relevant and admissible facts are undisputed and may be found in the agreed Pretrial Order entered by the lower court on December 13, 1965 (Clk. R. 43-49).

At all times material herein appellant, Seattle-First National Bank, was and now is a national banking association with its main office in Seattle, Washington, and, the appellee, The Crown Life In-

surance Company, was and now is an alien Canadian corporation with its principal place of business in Toronto, Canada, engaged in the business of transacting life and disability insurance as an alien insurer in the State of Washington (Clk. R. 1-2).

At all times material herein until his death on December 7, 1961, Charles M. Clark (herein referred to as "Clark"), was an individual married to Eleanor S. Clark and they resided as husband and wife in Seattle, Washington (Clk. R. 44).

On December 1, 1959, Clark executed a written application to appellee (Ex. 1) for a policy of term insurance on his life in the amount of $300,000 and directed appellee to name as the beneficiary thereof "Eleanor S. Clark, wife, if living, if not to insured's living children—equally." In said written application (Ex. 1) it was provided:

> "(2) The policy applied for shall not take effect until it has been manually received and accepted by the owner and the first premium paid thereon, and it shall then be effective only if there has been no change in the insurability of the proposed insured subsequent to the completion of this application."
>
> (Clk R. 44)

Said written application (Ex. 1) was approved by appellee and appellee issued and delivered to Clark in Seattle, Washington, a term policy of insurance on Clark's life, No. 835,907 in the amount of $300,000. Said policy (herein referred to as the "Original Policy") has never been in appellant's possession nor has appellant ever seen or examined the same. (Clk. R. 44-45).

Thereafter, Clark executed and delivered to appellee a written document dated February 28, 1961,

entitled "Request for Change in Policy," requesting appellee to "Convert policy to Guaranteed Equity Plan, $300,000, Annual Premium—Non Par effective 11, December, 1960" (Clk. R. 45-46).

Pursuant to said request, appellee issued and delivered to Clark the written policy of life insurance (Ex. 2) which is the basis of appellant's claim for relief in this action. Said policy (herein referred to as the "Converted Policy") is dated March 8, 1961. The beneficiary named therein is "ELEANOR S. CLARK (wife of the insured) if living; otherwise the children of the insured in equal shares or the survivors in equal shares, or the survivor." The Converted Policy bears the same policy number as did the Original Policy (835,907), is in the same amount as the Original Policy ($300,000), and was issued and delivered to Clark without medical examination. Upon delivery to him of the Converted Policy, Clark at appellee's request, surrendered to appellee the Original Policy which was thereafter destroyed by appellee (Cl. R. 46).

At the time said Converted Policy (Ex. 2) was delivered to Clark the following riders and endorsements were attached thereto (Clk. R. 46):

> Written application for insurance dated December 1, 1950 (Ex. 1) referred to above;
>
> "Change of Beneficiary Form" dated December 18, 1959, executed by Clark and directing the appellee to "Change the beneficiary to Executors, Administrators or Assigns of the Insured";
>
> "Request for Change in Policy" dated December 18, 1959, executed by Clark, requesting appellee to "Change the premium to $3,586.50 payable on the 11 day of December in each year",

effective as from the 11 day of December, 1959; and the

"Request for Change in Policy" dated February 28, 1961, wherein Clark requested the appellee to "Convert Policy to Guaranteed Equity Plan, $300,000, annual premium—Non Par, effective 11, December, 1960."

On September 28, 1961, pursuant to Clark's written request (Ex. A-3) which was and is attached to the Converted Policy, appellant became and at all times since has remained the sole beneficiary of the Converted Policy (Clk. R. 47-48).

Clark died by suicide in Seattle, Washington, on December 7, 1961. At the time of his death, all premiums due and payable under the Converted Policy in the aggregate amount of $11,982.48 had been paid in full and said Converted Policy was in full force and effect (Clk. R. 48).

At the time of Clark's death the Converted Policy (Ex. 2) contained an incontestable clause and a suicide clause providing, respectively, as follows:

"6. *Incontestability.* This policy will be incontestable after it has been in force during the lifetime of the insured for two years from the date on which it became effective; except for non-payment of premiums and except for any benefits in case of Total Disability or Accidental Death and except for risks not assumed or insured against under this policy.

"12. *Claims.* * * * If the insured shall die by suicide, whether sane or insane, within two years of the date on which this policy became effective, the liability of the Company hereunder shall be limited to a return of the premiums paid."

Following Clark's death appellant, as the named

beneficiary of the Converted Policy, submitted to appellee a written claim (Ex. 4) for the death benefits thereof in the sum of $300,000, and in conjunction with said claim, surrendered the Converted Policy to the appellee (Clk. R. 49). Appellee denied any liability to appellant for the face amount of the Converted Policy and in lieu thereof tendered to appellant the sum of $11,982.48 representing a return of premiums paid by Clark. Initially, appellant rejected said tender but later accepted the same pursuant to a stipulation with appellee that such acceptance would not prejudice appellant's right to pursue its claim for the balance of the face amount of the Converted Policy (Clk. R. 49). Thereafter, on February 11, 1963, appellant commenced this action.

Pleadings, Pretrial Proceedings and Trial

In its complaint (Clk. R. 1-21) appellant alleged and contended that as the named beneficiary of the Converted Policy (Ex. 2) it was entitled to recover judgment against the appellee for the remaining unpaid balance of the face amount of the Converted Policy ($288,017.52) together with interest thereon.

Appellee in its answer (Cl. R. 22-24) admitted the existence of the Converted Policy and, by way of affirmative defense, alleged that the Converted Policy had become effective no earlier than December 11, 1959, within two years of Clark's death by suicide, and that under the policy's suicide clause set forth above, its liability to appellant was limited to a return of premiums paid.

On August 3, 1965, appellant and appellee executed and filed with the Clerk of the District Court an agreed Pretrial Order (Clk. R. 43-58) which was entered by the lower court on September 27, 1965.

(Clk. R. 58). Thereafter, prior to trial, appellant and appellee, through their respective counsel, executed and entered into an Amended Stipulation (Clk. R. 60-61) wherein appellant stipulated, subject to its right to object to the admissibility thereof at the time of trial, that, if present, one Robert H. Edmiston of Seattle, Washington, would testify to the matters and facts therein set forth.

The case went to trial before the Honorable George H. Boldt, sitting without a jury, on November 29, 1965. In support of its claim for relief, appellant offered Exhibits 1 through 4, including the Converted Policy with its attachments (Ex. 2) which were admitted in evidence without objection (Reporter's Transcript of Proceedings, page 2; herein referred to as Rep. Tr. 2). Thereupon, appellant rested its case (Rep. Tr. 3).

In defense, appellee then elicited and offered in evidence the testimony of Gordon John Hirlihey, manager of appellee's policy issuing department (Rep. Tr. 3-14), the testimony of Elizabeth Jean Dawson, the cashier of appellee's Seattle agency (Rep. Tr. 16-17, 19-21), the testimony of Robert H. Edmiston (Rep. Tr. 18-19) as contained in the Amended Stipulation between the parties (Clk. R. 60-61), and Exhibits A-1 through A-10, which were admitted in evidence by the lower court over the continuing objection of appellant's counsel, interposed upon the ground that such evidence and testimony violated the parol evidence rule and the rule of statutory integration of life insurance contracts as contained in The Insurance Code of the State of Washington. (Rep. Tr. 6-7, 18).

Upon the conclusion of the trial and after hearing argument of counsel, the lower court rendered an

oral opinion (Rep. Tr. 22-24) in favor of the appellee. The lower court ruled purely as a matter of interpretation and construction of the Converted Policy, with its attachments (Ex. 2), that, for purposes of the suicide clause, the date of issue and effective date of said policy was, at the earliest, December 11, 1959; and that as Clark's suicide had occurred within two years of that date (December 7, 1961) appellant was not entitled to recover from appellee the face amount of the policy. On December 13, 1965, Findings of Fact (Clk. R. 62-64), Conclusions of Law (Clk. R. 64-65) and Judgment of Dismissal (Clk. R. 66) were entered, dismissing appellant's action with prejudice and granting appellee judgment against appellant for its taxable costs and disbursements.

The Questions Involved

The questions presented on this appeal are as follows:

1. Whether parol or other evidence extrinsic of the Converted Policy and its attachments (Ex. 2), was admissible in evidence at the instance of the appellee insurer to construe, supply or prove any term or provision of the insurance contract between Clark and the appellee insurer?

2. What was the commencment date of the two year period of the suicide clause in the Converted Policy?

3. Whether, as a matter of law, the suicide clause in the Converted Policy is so incomplete and ambiguous as to render the same unenforceable against the appellant?

4. Whether, as a matter of law, the suicide clause contained in the Converted Policy violates the pub-

lic policy of the State of Washington as contained in The Insurance Code of the State of Washington and, for that reason, is illegal, void and unenforceable?

SPECIFICATIONS OF ERROR

The specifications of error relied upon and which are intended to be urged are as follows:

1. The trial court erred in admitting any evidence offered by appellee which was not in writing and physically attached to the Converted Policy. In particular, the trial court erred in admitting in evidence the following testimony and documents over the continuing objection of appellant's counsel, interposed upon the ground that the same violated the parol evidence rule and the rule of statutory integration of life insurance contracts as contained in The Insurance Code of the State of Washington (Rep. Tr. 6-7, 17-18):

(a) The testimony of the witness Gordon John Hirlihey, elicited in connection with appellee's Exhibits A-1, A-2 and A-9, to the effect that, under the terms and provisions of the Original Policy issued by appellee to Clark (which was not physically attached to the Converted Policy) the date of issue thereof was December 11, 1959, that the same was a 27-year term policy to age 65, that the expiration date thereof was December 11, 1986, that the first premium due date thereof was December 11, 1959, that the first policy year thereunder commenced December 11, 1959, that said Original Policy was typed and prepared on December 11, 1959, and that appellee's Exhibit A-9 was a duplicate copy of

said Original Policy (Rep. Tr. 8, line 1, to 11, line 20).

(b) The testimony of the witness Robert H. Edmiston (Rep. Tr. 18) as contained in an Amended Stipulation (Clk. R. 60), to the effect that he was the agent who wrote the insurance on Clark's life and that the Original Policy was delivered to Clark and the first premium thereon paid by Clark on the same day that Clark's check in the amount of $3,586.50 (Ex. A-6) was delivered to appellee at its Seattle office.

(c) Appellee's Exhibits A-1 (Master record sheet) and A-2 (premium card) which were not attached to the Converted Policy, purporting to show the terms, provisions, form, amount, plan, date of issue, premium, first premium due date, and beneficiary of the Original Policy (Rep. Tr. 8, line 1, to 11, line 20).

(d) Appellee's Exhibit A-6 (Rep. Tr. 17), being a cancelled check dated December 18, 1959, drawn by Clark and payable to the order of appellee in the sum of $3,586.50; together with appellee's Exhibit A-10, being a photocopy of a cash receipt (Rep. Tr. 19) prepared at appellee's Seattle office purporting to show the receipt by appellee from Clark on December 18, 1959, of appellee's Exhibit A-6; which said Exhibits A-6 and A-10, in conjunction with the testimony of the witness Robert H. Edmiston, were offered by the appellee as proof that the first premium payment on the Original Policy was made on December 18, 1959. (Rep. Tr. 17, 20).

(e) Appellee's Exhibit A-9 (Rep. Tr. 14), which was not attached to the Converted Policy, and which purports to be a specimen copy of the Original Policy issued by appellee to Clark, reconstructed and prepared by appellee from Exhibit A-1, approximately one week prior to trial. (Rep. Tr. 11).

2. The trial court erred in finding as a matter of fact (Finding of Fact I, Clk. R. 62) that a policy of term insurance on the life of Clark was issued by appellee on the 11th day of December, 1959, for the reason that there was no admissible evidence to support of such finding, and for the further reason that such finding is a conclusion of law.

3. The trial court erred in finding as a matter of fact (Finding of Fact II, Clk. R. 63) that the Converted Policy became effective December 11, 1960, for the reason that there was no admissible evidence to support such finding and for the further reason that such finding constitutes a conclusion of law.

4. The trial court erred in finding as a matter of fact (Finding of Fact V, Clk. R. 64) that under the terms and provisions of the Converted Policy (Ex. 2) the date of issue of the Original Policy and its effective date was fixed at December 11, 1959, and in further finding as a matter of fact that the two year period of the suicide clause commenced as of said date, for the reason that there was no admissible evidence to support such finding and for the further reason that such finding, in its entirely, constitutes a conclusion of law.

5. The trial court erred in concluding (Findings of Fact V and VI, Clk. R. 64, Rep. Tr. 23-24) that, under the terms and provisions of the Converted

Policy (Ex. 2), without reference to anything else, the date on which said Converted Policy became effective, for purposes of construing and applying the suicide clause contained in said policy, was December 11, 1959, and in failing to conclude that, under the terms and provisions of said Converted Policy, without reference to anything else, the date on which said policy became effective, for purposes of said suicide clause, was December 1, 1959.

6. The trial court erred in failing to conclude that, as a matter of law, the suicide clause contained in said Converted Policy (Ex. 2) is so incomplete and ambiguous as to render the same unenforceable as a contractual limitation upon appellee's liability to appellant.

7. The trial court erred in failing to find and conclude that, as a matter of law, the suicide clause contained in said Converted Policy (Ex. 2) violates the public policy of the State of Washington as announced in The Insurance Code of the State of Washington and for that reason, was and is illegal, void and unenforceable.

8. The trial court erred in failing to conclude that, under established rules of construction pertaining to life insurance contracts, the appellee failed to sustain the burden of proving by competent and admissible evidence that the two-year period of the suicide clause as contained in the Converted Policy commenced within two years of the date of Clark's suicide.

9. The trial court erred in concluding (Conclusions of Law I and II, Clk. R. 64-65) that appellant is not entitled to recover from appellee and in failing to conclude that appellant is entitled to judgment

against appellee in the sum of $288,017.52 together with interest thereon.

ARGUMENT OF THE CASE

Summary of Argument

The argument falls into two basic parts, first, an argument that the trial court committed reversible error by admitting parol evidence to construe and interpret the terms and provisions of an integrated life insurance contract; and second, an argument that the trial court's interpretation and construction of said integrated life insurance contract was erroneous.

The argument may be summarized as follows:

Part I: Under the rule of integration of The Insurance Code of the State of Washington, the Converted Policy, with its attachments, constituted an integrated contract of insurance; the terms and provisions of the suicide clause contained in said Converted Policy must be construed within the "four corners" of the Converted Policy with its attachments; and neither parol nor other evidence extrinsic of (not attached to) the Converted Policy was admissible in evidence at the instance of the appellee insurer, to prove either the "date of issue" or the "effective date" of either the Original Policy or the Converted Policy, for purposes of determining, as a matter of construction, the commencement date of said suicide clause.

Part II: The suicide clause as contained in the Converted Policy is incomplete and capable of two or more meanings or susceptible of two or more constructions, and, in addition, does not comply with The Insurance Code of the State of Washington

(R.C.W. 48.23.260(1)(b); under well established rules of construction relating to exclusionary clauses in life insurance contracts, the trial court was required to conclude, as a matter of law, that under the terms and provisions of the Converted Policy, with its attachments, the two-year period of the suicide clause commenced not later than December 1, 1959. Accordingly, the trial court's conclusion that said two-year period commenced not earlier than December 11, 1959, was erroneous.

ARGUMENT

PART I

Specification of Error No. 1

PAROL OR OTHER EVIDENCE EXTRINSIC OF THE CONVERTED POLICY WAS NOT ADMISSIBLE AT THE INSTANCE OF THE APPELLEE INSURER AS PROOF OF ANY TERM OR PROVISION OF THE INSURANCE CONTRACT

At the trial of this action in the lower court appellant, in support of its case, offered in evidence Exhibits 1 through 4, including the Converted Policy with its attachments (Ex. 2) which were admitted in evidence without objection (Rep. Tr. 2). Thereupon, appellant rested its case (Rep. Tr. 3). At that juncture, the entire written insurance contract (Ex. 2) comprising the basis of appellant's claim for relief was before the lower court for construction and interpretation. At that juncture it was admitted that, at the time of Clark's death, the Converted Policy was in full force and effect, all premiums due and payable thereunder had been paid in full, and that appellant was the sole named beneficiary thereof.

(Pre. Tr. Or., Ad. Facts 12, 13; Clk. R. 48). At that juncture appellant was entitled to recover from appellee the full face amount of the Converted Policy unless the appellee proceeded as a matter of defense, to establish by a preponderance of admissible evidence, that the Converted Policy contained an *enforceable* exclusionary provision *applicable* to restrict or defeat such recovery. *Williams vs. Metropolitan Life Ins. Co.,* (S.C., 1943) 25 S.E.(2d) 243, 245; *Chavis vs. Home Security Life Ins. Co.,* (N.C., 1960) 112 S.E.(2d) 574, 576; *Casey vs. Metropolitan Life Ins. Co.,* (1921) 189 N.Y.S. 70.

In an attempt to sustain this burden of proof, appellee proceeded to elicit and offer in evidence the testimony of Gordon John Hirlihey, manager of appellee's policy issuing department (Rep. Tr. 3-14), the testimony of Elizabeth Jean Dawson, the cashier of appellee's Seattle agency (Rep. Tr. 16-17, 19-21), the testimony of Robert H. Edmiston, (Rep. Tr. 18-19; Clk. R. 60-61) and, in conjunction with such testimony, also offered in evidence certain written documents, Exhibits A-1, A-2, A-6, A-9 and A-10, none of which had been or were attached to or comprised a part of the Converted Policy. The trial court admitted the testimony and said exhibits over the continuing objection of appellant's counsel, interposed upon the ground that the admission thereof violated the parol evidence rule and the rule of integration of life insurance contracts as contained in The Insurance Code of the State of Washington (Rep. Tr. 6-7, 18).

This testimony and the listed exhibits were offered by appellee and admitted by the trial court for the obvious purpose of establishing (i) the date of issue of the Original Policy; (ii) the date of delivery

and date of first premium payment of the Original Policy; (iii) the terms and provisions of the Original Policy; and (iv) derivatively, *the effective date of the Converted Policy.*

Appellee's Exhibit A-1 is an internal business record entitled "Master Record Sheet" maintained by appellee at its home office. (Rep. Tr. 4-5). According to Mr. Hirlihey, it is the document from which the Original Policy was prepared. (Rep. Tr. 4, 8).

Similarly, appelleee's Exhibit A-2 is an internal business record maintained by appellee at its home office, designated by Mr. Hirlihey to be a "Premium Card," prepared from the Master Record Sheet. (Rep. Tr. 9-10).

After testifying as to the contents of the Master Record Sheet (Rep. Tr. 8-9), Hirlihey further testified that appellee had destroyed the Original Policy (Rep. Tr. 9):

> "Q. Mr. Hirlihey, what has happened to the original term policy, No. 835907?
>
> "A. Our general practice on term policies, when they are converted, the converted policy is issued under the same number, and we ask for the return of the original policy, and it is our normal procedure to destroy this, because the new policy is a continuation of the original policy. We have filing problems, if you retain a complete policy. We can produce the original policy from this form, and it is much easier to keep a single sheet of paper than to keep several copies of pages."

Thereupon, appellee offered and there was admitted in evidence Exhibit A-9 which purported to be a copy of the Original Policy issued to Clark, reconstructed and prepared by appellee approximately one week prior to trial, from the Master Record

Sheet. (Rep. Tr. 11). Then, through the testimony of Mrs. Dawson, cashier of appellee's Seattle agency, appellee introduced in evidence, over the continuing objection of appellant (Rep. Tr. 17) extraneous exhibits A-6 and A-10.

Exhibit A-6 is a cancelled check dated December 18, 1959, drawn by Clark and payable to the order of the appellee in the sum of $3,586.50 (Rep. Tr. 17). Exhibit A-10 is a photocopy of a Cash Receipt kept in appellee's home office (Rep. Tr. 19-20) which purports to show that Clark's cancelled check (Ex. A-6) was received by appellee and deposited on December 18, 1959 (Rep. Tr. 19-20). In order to complete the tainted circle of evidence, appellee then introduced, over the objection of appellant (Rep. Tr. 18) the written testimony of Robert H. Edmiston (Clk. R. 60), the agent who wrote the insurance on Clark's life, to the effect that the Original Policy was delivered to Clark upon the same day that Clark's check in the amount of $3,586.50, payable to appellee's order (presumably Ex. A-6) was turned over to appellee at its Seattle office.

All of the foregoing evidence and testimony was extraneous of the Converted Policy and related solely to the negotiations and transactions between Clark and the appellee with respect to the Original Policy, which was not attached to and comprised no part of the Converted Policy.

As will be demonstrated, in Part II hereof, appellee, by destroying the Original Policy and failing to attach the same, or a proper endorsement, to the Converted Policy, created a situation under which the insured could not determine his contractual rights under the written policy in his possession. In such case, the appellee insurer may not defeat its

contractual liability to the beneficiary by supplying missing terms and provisions of an exclusion with oral testimony and documentary evidence extraneous of the written policy.

Under The Insurance Code of the State of Washington, the Converted Policy, with its attachments (Ex. 2) is constituted an integrated contract of insurance as a matter of law.

In this regard the applicable sections of The Insurance Code (R.C.W. Title 48) provide as follows:

> *R.C.W. Sec.* 48.18.140. *Contents of policies in general.*
>
> "(1) The written instrument, in which a contract of insurance is set forth, is the policy."
>
> *R.C.W. Sec.* 48.18.190. *Policy must contain entire contract.*
>
> "No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy."
>
> *R.C.W. Sec.* 48.18.520. *Construction of Policies.* "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended or modified by any rider, endorsement, or application attached to and made a part of the policy."
>
> *R.C.W. Sec.* 48.23.040 *Entire contract—Representations.*
>
> "In all such policies other than those containing a clause making the policy incontestable from date of issue, there shall be a provision that the policy and the application therefor, if a copy thereof has been endorsed upon or attached to the policy at issue and made a part

thereof, shall constitute the entire contract between the parties . . ."

In addition, the Converted Policy, in pertinent part, reads as follows:

"5. *The Contract* This policy and the application therefor, a copy of which is attached hereto and made a part hereof, constitute the entire Contract."

The foregoing provisions of The Insurance Code and the quoted provision from the Converted Policy require the conclusion that written documents and oral testimony extrinsic of (not attached to) the written policy itself may not be considered by the Court to supply or construe any term or provision of the insurance contract that would defeat or limit the liability of the insurer.

The purpose of this statutory requirement (that the entire contract be physically embodied in the policy), is stated in 1 *Couch on Insurance* 2*d,* Sec. 3.20 at page 143:

". . . statutes of this character are clearly intended to protect the policy holder by requiring the insurer to place in his hands written evidence of the entire contract, or, in other words, by requiring all the terms, conditions and representations, to be incorporated or embodied in the policy, and thereby largely eliminate the evils growing out of uncertainly and the imposition which might otherwise be practiced, by permitting the insurer to know from his policy what his contract is. In fact, the laudable purpose is to furnish both parties the entire contract between them, and to enable them both to be informed of the exact terms of the policy."

As a consequence, under the statutes set forth above, the policy, with its attachments, constitutes the sole

contract, ". . . to the exclusion of all anterior or contemporaneous agreements not contained or expressed in the policy . . ." 1 *Couch on Insurance* 2d 144, Sec. 3.21.

> As a further result of the statutory requirement: ". . . nothing can be added to the contract as written, by construction or otherwise, except such terms as may be imposed upon the parties by operation of some valid and applicable law with reference to which the parties are deemed to have contracted." 1 *Couch on Insurance* 2d 148, Sec. 3.23.

The obvious end result of this doctrine of statutory integration, as it relates to contracts of insurance, is set forth in *IX Wigmore on Evidence* (3rd Ed.) Sec. 2452, at page 168, as follows:

> "By statute in numerous jurisdictions [including Washington by footnote reference] all parts of a transaction of life insurance must be embodied in a single document. The construction of this type of statute illustrates neatly the distinction between the doctrine of integration * * * and that of written formality * * *; *because even written parts of the transaction not embodied in the policy will by this rule be ignored. It is also to be noted that these statutes go further than any other application of the rule, in that they require a physical and not merely (as for wills) a grammatical or literary integration.*" (Emphasis added)

In other words, any document, in order to be considered in connection with or as part of the insurance contract before the Court, must be *physically* attached to the policy evidencing the contract. *Western Casualty & Surety Co. v. Harris Petroleum Co.,* (S.D. Cal. 1963) 220 F. Supp. 952 (Under R.C.

W. Sec. 48.18.190, neither prior unattached policies nor unattached business records of the insurer may be considered on question of coverage under subsequent policy); *Nat. Ind. Co. vs. Smith-Gandy,* (1957) 50 Wn.2d 124, 309 P.2d 742 (prior correspondence between insurer and insured not admissible on question time policy became effective); *Washington Fire Relief Ass'n v. Albro,* (1924) 130 Wash. 114, 226 Pac. 264 (application for fire insurance not attached to policy not admissible at instance of insurer); *National Life & Accident Ins. Co. v. Barlow,* (Ky., 1933) 57 S.W.2d 997, 1000 (insurer's rating manual, unattached to policy, not admissible as defense to policy coverage); *Frost v. Metropolitan Life Ins. Co.,* (Pa., 1940) 12 A.2d 309 (application folded in but not attached to policy, inadmissible at instance of insurer); *Blatz v. Travelers Ins. Co.,* (1947) 68 N.Y.S.2d 801 (aviation exclusion by rider delivered to insured but not attached to policy, inadmissible and ineffective as defense to action on life policy); *Coughlin v. Reliance Life Ins. Co.,* (Minn., 1925) 201 N.W. 920, 922 (terms of promissory note given as premium payment on life policy not admissible to prove lapse for non-payment of premium); *Jones v. Metropolitan Life Ins. Co.,* (Pa. 1944) 39 A.2d 721 (booklet of insurer not attached to policy held inadmissible to supply provision favorable to insurer).

As stated in *Archer v. Equitable Life Assur. Soc. of U.S.,* (N.Y., 1916) 112 N.E. 433, at page 435:

> "All of the stipulations, agreements, or statements constituting the contract must be placed, through the delivery of the policy, in the possession of and be and remain accessible to the insured."

The public policy sustaining such a statutory requirement is obvious. It reduces the contract or policy to one paper and ". . . leaves a complete written record of the business when the insured cannot speak." *Coughlin v. Reliance Life Ins. Co.,* supra. The rule applies to bar from evidence offered at the instance of the insurer, ". . . policies of insurance previously issued to the same applicant." *Abbott v. Prudential Ins. Co. of America,* (N.Y., 1939) 24 N.E. 2d 87, 90. It even serves to render ineffective conditions and stipulations on the reverse side of a policy not sufficiently referred to on the face of the policy. *Burbank v. Pioneer Mut. Ins. Ass'n.* (1910) 60 Wash. 253, 110 Pac. 1005.

The rule is clear. The testimony of the witnesses Hirlihey and Edmiston and appellee's Exhibits A-1, A-2, A-6, A-9 and A-10 were offered by the appellee and admitted and considered by the lower court for the purpose of construing, interpreting and supplying an omission from the terms and provisions of the exclusionary suicide clause of the Converted Policy. Such testimony and exhibits should have been excluded and appellant's objections thereto sustained. Appellant respectfully submits that, in admitting this parol evidence, the trial court committed reversible error.

PART II

Specifications of Error Nos. 2-9

THE TRIAL COURT'S DETERMINATION THAT THE COMMENCEMENT DATE OF THE TWO-YEAR PERIOD OF THE SUICIDE CLAUSE WAS FIXED IN THE CONVERTED POLICY AS DECEMBER 11, 1959, WAS ERRONEOUS. UNDER THE CONSTRUCTION OF SAID CLAUSE MOST FAVORABLE TO THE APPELLANT THE TWO-YEAR PERIOD THEREOF COMMENCED NOT LATER THAN DECEMBER 1, 1959, MORE THAN TWO YEARS PRIOR TO CLARK'S SUICIDE

Introduction

As with all life insurance policies issued in this day and age, the Converted Policy (Ex. 2) is replete with printed provisions, riders and endorsements, commencing with a copy of Clark's written application for insurance (Ex. 1) dated December 1, 1959. These provisions are calculated to extend, define and restrict the appellee insurer's liability. They do not, however, accomplish this purpose in one fatal respect. The Converted Policy does not contain among its many provisions "the date on which this policy became effective" for purposes of determining the commencement date of the two-year period of the suicide clause. As will be demonstrated, this simple omission completely emasculates the Converted Policy's so-called "suicide clause" and leaves the respective rights and liabilities of the parties under the policy in a state of complete confusion. As stated by this court in *United States vs. Eagle Star Ins. Co.*, (9 Cir., 1953) 201 F.(2d) 764, 766:

> "Had the insurance company deliberately set out to achieve obfuscation it could hardly have done a better job than was accomplished here."

Under The Insurance Code of the State of Washington, an insurer may, in any life insurance policy, limit its liability to an amount not less than the full reserve of the policy and dividend additions thereto, in the event *only* of death occurring as a result of suicide of the insured *within two years from date of issue of the policy*. R.C.W. 48.23.260 (1)(b). The same time limit applies to incontestability. R.C.W. 48.23.050. In other words, under The Insurance Code, the *maximum* time during which the suicide exclusion may apply is two years from date of issue of the policy. This is a permissive exclusion and while the insurer may, of course, shorten the exclusionary period to, for instance, one month or one year from the date of issue, or omit the clause entirely, the insurer may not extent the period of the exclusion to in excess of two years from the date of issue of the policy. *Shank vs. Fidelity Mut. Life Ins. Co.,* (Minn., 1945) 21 N.W.(2d) 235; *Nordin vs, Commercial Casualty Ins. Co.,* (1934) 176 Wash. 59, 28 P.2d 259.

As appears from Exhibit A-5, entitled "Request for Change in Policy," dated February 28, 1961, and the Pretrial Order herein (Pre. Tr. Or. Ad. Fact 5, Clk. R. 44-45), the Converted Policy (Ex. 2) was originally a term policy of life insurance and was converted, at Clark's request, to a guaranteed equity policy, the principal amount of the insurance remaining the same. The original term policy was thereupon destroyed by the appellee (Rep. Tr. 9), but prior to such destruction there obviously was removed from the Original Policy and attached to the new Converted Policy a copy of the application for

the Original Policy (Ex. 1), dated December 1, 1959, antedating the date of the Converted Policy (March 8, 1961) by more than a year. There were also attached to the new Converted Policy certain other riders and endorsements, also obviously derived from the Original Policy, each of which antedate the new Converted Policy by many months. For instance, an examination of the new Converted Policy will show that the beneficiary named on the face thereof is the same beneficiary initially designated in Clark's written application (Ex. 1) for the Original Policy. However, a Change of Beneficiary form dated December 18, 1959, attached to the Converted Policy (Pre. Tr. Or. Ad. Fact 9, Clk. R. 46), served to change the named beneficiary under the Converted Policy from "Eleanor S. Clark, wife, etc." to Clark's "Executors, Administrators or Assigns." As the Original Policy has been destroyed (Pre. Tr. Or. Ad. Fact 5, Clk. R. 45) there is no way to ascertain whether all of the riders and endorsements of the Original Policy were attached to the Converted Policy. In any event, it is clear that neither the Original Policy nor a copy thereof was attached to the new Converted Policy. Under Part II hereof it is appellant's contention that the suicide clause as contained in the Converted Policy is incomplete in that the commencement date of the two-year period thereof is missing from the policy; that by reason of this omission, such suicide clause is so indefinite and vague as to be meaningless and of no force or effect whatever, or that, if such clause is capable of being construed and enforced, the construction most favorable to appellant requires the conclusion, as a matter of law, that the two-year period thereof commenced no later than December 1, 1959, the earliest

date of reference in the insurance transaction between Clark and the appellee.

It is a well established rule that when a policy of life insurance is renewed or converted under circumstances as in this case, the contract of insurance between the insured and the insurer is considered to be a single continuing contract for purposes of determining the commencement date of the suicide clause in the most recent policy; and the insurer may not utilize the date of issue or effective date of the most recent policy as such commencement date, for the purpose of establishing the defense of suicide. 29A *Am. Jur.* 298, *Insurance,* § 1151; *Annotation*: 110 A.L.R. 1139;*Silliman vs. International Life Ins. Co.,* (Tenn., 1915) 174 S.W. 1131; *Baugh vs. Metropolitan Life Ins. Co.* (Tenn., 1938) 117 S.W.2d 742; *Western & Southern Life Ins. Co. vs. Shelby,* (Ind., 1935) 194 N.E. 197; *Morse vs. Gen'l American Life Ins. Co.,* (Neb., 1935) 263 N.W. 676; *Massachuetts Mutual Life Ins. Co. vs. Thacher,* (1961) 222 N.Y.S. 2nd 339.

How, then, is the commencement date of the suicide clause in the most recent (converted) policy to be determined? As demonstrated above, the statutory rule of integration applying peculiarly to contracts of insurance precludes the *insurer* from introducing the initial policy or other extraneous documents (unattached to the converted policy) to establish the commencement date of the clause. Obviously, in such case, the insurer could establish such commencement date beyond question by attaching an appropriate endorsement to the converted policy. However, in this action, no such endorsement is attached to the Converted Policy. The *only* portion of the Original Policy which is

attached to the Converted Policy and which purports to deal, specifically, with the initial negotiations between Clark and the appellee under which the contract of insurance was effected, is the written application for insurance (Ex. 1) dated December 1, 1959. Simply stated, it is appellant's contention that the only logical purpose for removing that application from the Original Policy, destroying the Original Policy and then attaching such application to the Converted Policy, was to establish a date of reference from the Original Policy to the Converted Policy for the commencement of the two-year period of the suicide and incontestability clauses under the Converted Policy; and that, as a matter of law, the two-year period of the suicide clause in the Converted Policy commenced (by attached reference to the Original Policy) on December 1, 1959, more than two years prior to the date of Clark's suicide.

In the alternative, appellant also contends that the exclusionary suicide clause utilized by appellee in the Converted Policy violates The Insurance Code of the State of Washington and, accordingly, is illegal, void and unenforceable.

The Trial Court's Findings of Fact Are Erroneous Conclusions of Law

At the trial of this action, appellee's sole defense to appellant's claim for relief was the exclusionary suicide clause in the Converted Policy, which provides:

> "If the insured shall die by suicide, whether sane or insane, *within two years of the date on which this policy became effective,* the liability of the Company hereunder shall be limited to a

return of the premiums paid." (Emphasis added)

In order to sustain this defense, appellee had the burden of proving by competent and admissible evidence that this policy exclusion was applicable to defeat or limit appellant's right of recovery. *Burrier vs. Mutual Life Ins. Co.,* (1963) 63 Wn.2d 266, 270, 387 P.2d 58. As stated in 29A *Am. Jur.* 918. *Insurance,* § 1854:

> ". . . an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the loss . . . comes within the purview of the exception or limitation set up."

With the foregoing in mind, let us examine the Finds of Fact entered by the trial court (Clk. R. 62-64). In the oral opinion of the trial court, incorporated by reference as Finding of Fact VI (Rep. Tr. 22-24, Clk. R. 64), the trial court stated:

> "In my opinion, making full allowance for the contentions of the Plaintiff, it is clear that as a result of the combination of the terms and *without reference to anything else,* Exhibit 2 being the converted policy, that the date of issue of the original policy and its effective date, in so far as the questions we are here concerned with, at the earliest was December 11, 1959." (Emphasis added)

Then, the trial court proceeded to find as matters of fact (i) in Finding of Fact 1 (Clk. R. 62) that a policy of term life insurance on Clark's life, No. 835,907, was "issued on the 11th day of December, 1959"; (ii) in Finding of Fact II (Clk. R. 62-63) that, in accordance with Clark's request, said policy of term insurance was converted and a Converted Policy was issued bearing date of March 8, 1961,

"effective December 11, 1960"; and (iii) in Finding of Fact V (Clk. R. 64):

> "That by virtue of the combination of the terms and provisions contained within Exhibit 1 (Converted Policy No. 835,907) and without reference to anything else, the date of issue of the original policy and its effective date was fixed at December 11, 1959. The period of two years as provided in the aforesaid suicide clause commenced as of said date."

If we assume, as did the trial court in its oral opinion (Rep. Tr. 23), that the parol evidence rule is applicable and that the issues in question are to be determined by the terms and provisions of the Converted Policy and its attachments (Ex. 2), without reference to anything else, then it is obvious, appellant suggests, that the so-called Findings of Fact above referred to are not findings of fact at all but rather are conclusions of law which are not subject to the clearly erroneous rule of Rule 52 (a) of the Federal Rules of Civil Procedure. *Valley Construction Co. vs. Lake Hills Sewer District.*, (1966) 67 W.D. 2d 902, 913, 410 P.2d 796; *Republic Pictures Corp. vs. Rogers,* (9 Cir., 1954) 213 F.2d 662, 664; *Cordovan Associates, Inc. vs. Dayton Rubber Company,* (6 Cir. 1961) 290 F.2d 858, 860. As stated by the Sixth Circuit Court of Appeals in *Cordovan,* 290 F.2d 858 at p. 860:

> "The interpretation and construction of a written contract are matters of law within the competence of the Court of Appeals to review and do not come under the clearly erroneous rule."

Appellant further suggests, consequently, that this Court is not bound by the lower court's so-called Findings of Fact and may review the terms

and provisions of the Converted Policy, with its attachments, to determine whether, as a matter of law, the trial court was correct in concluding that, under the terms and provisions of the Converted Policy, the commencement date of the suicide clause is fixed as December 11, 1959. In this regard, it is appellant's contention that there is no term or provision in the Converted Policy or its attachments to support this erroneous conclusion of law, and that the appellee failed to sustain its burden of proof on this issue.

Application of Established Rules of Construction to the Converted Policy Requires the Conclusion that the Two-Year Period of the Suicide Clause Commenced December 1, 1959.

Under the specific terms of the suicide clause in the Converted Policy, the two-year period in question commenced on "the date on which this policy became effective." That effective date is not, however, set forth or to be found within the four corners of the Converted Policy. In this vital respect the Converted Policy is incomplete and the meaning of the suicide clause is vague and uncertain. Accordingly, the missing date must either be supplied by judicial construction of the terms and provisions of the Converted Policy as in *Brun v. Northern Life Ins. Co.,* (1943) 16 Wn.2d 564, 570, 134 P.2d 84, or the exclusion must be held to be ineffective as a contractual limitation upon appellee's liability to appellant. *General American Casualty Company vs. Austin,* (E.D. Ark., 1954) 125 F.Supp. 721, 724.

Clark's suicide occurred on December 7, 1961. In the trial court *appellee* contended that, for purposes

of the suicide clause, the "date on which this policy became effective" was December 11, 1959 (four days less than two years of suicide) *or* December 18, 1959, (eleven days less than two years of suicide), *or* December 11, 1960, (in excess of a year less than two years of suicide). (Pre. Tr. Or. Def. Cont. 3, 4, 9, Clk. R. 53, 55). Insofar as is ascertainable from the Converted Policy, without reference to anything else, the significance, if any, of these respective dates appears to be as follows: In Paragraph 21 of the Converted Policy (Clk. R. 47) December 11, 1959, is referred to as the date on which the Original Policy was issued. December 18, 1959 is the date of two endorsements attached to the Converted Policy (Pre. Tr. Or., Ad. Facts 6, 7, Clk. R. 45), one of which served to change the named beneficiary of the Original Policy and the other of which changed the premium thereof to an annual premium. December 11, 1960 is referred to in an endorsement attached to the Converted Policy, dated February 28, 1961 (Pre. Tr. Or. Ad. Facts 8, Clk. R. 45), as the effective date of the conversion of the Original Policy to the Converted Policy and is also found on the face of the Converted Policy as the date from which its first policy year is to be computed.

As mentioned above, at page 26 hereof, the insurer may not rely upon or utilize the effective date of the conversion of the Converted Policy as the commencement date of the suicide clause. Consequently, the only remaining dates under the Converted Policy, which by reference to the Original Policy, remain for consideration are December 1, 1959 (the date of the application for insurance attached to the Converted Policy), December 11, 1959 (the date on which the Original Policy was "is-

sued") and December 18, 1959 (the date of the endorsements attached to the Converted Policy).

Neither of the two endorsements in question, which served to change the named beneficiary and premium payment under the Original Policy, bears any reasonable relationship, inferentially or otherwise, to the "date on which this policy became effective" under the suicide clause of the Converted Policy. Therefore, December 18, 1959, insofar as appellant is aware, is without significance with respect to the issue before this Court. Thus, there remain but two dates for consideration, December 1, 1959, and December 11, 1959, the first of which would sustain the policy and appellant's recovery and the latter of which would serve to defeat the same.

In support of its contention that December 1, 1959, must be held to be the commencement date of the two-year period of the suicide clause, appellant relies upon the well established rule of construction that exclusionary clauses in insurance policies are to be strictly construed against the insurer and in favor of the insured. If the caluse in question is susceptible of two or more constructions, that meaning and construction most favorable to the insured must be adopted by the court, *even though the insurer may have intended another meaning. Starr vs. Aetna Life Ins. Co.,* (1905) 41 Wash. 199, 203, 204, 83 Pac. 113; *Selective Etc. vs. General Cas. Co.,* (1956) 49 Wn.2d 347, 351, 352, 301 P.2d 535; *Brown vs. Underwriters at Lloyds,* (1958) 53 Wn.2d 142, 152, 332 P.2d 228; *Labberton vs. General Cas. Co.,* (1958) 53 Wn.2d 180, 182, 183, 332 P.2d 250; *Thompson vs. Ezzell,* (1963) 61 Wn.2d 685, 688, 379 P.2d 983;*Horwitz vs. New York Life Ins. Co.,* (9 Cir.,

1935) 80 F.2d 295, 298. The burden in such case is on the insurer to establish not only that the clause in question is susceptible of the construction sought by the insurer, but that it is the *only* construction which may fairly be adopted. *Steven vs. Fidelity and Cas. Co. of New York,* (Cal., 1962) 377 P.2d 284, 292.

Appellee has necessarily conceded the uncertainty of the meaning of the suicide clause in the Converted Policy by suggesting not less than three different dates for the clause; but appellee has ignored the construction most favorable to appellant. When, as here, the uncertainty has been clearly established, the construction most favorable to appellant must be adopted.

The insurer's attachment to the Converted Policy of the application for the Original Policy together with some if not all of its riders and endorsements, coupled with the declaration therein that it was issued in lieu of the Original Policy "which is hereby cancelled" (Pre. Tr. Or. Ad. Fact 10, Clk. R. 47) makes it clear that the reference in the suicide clause of the Converted Policy to the effective date of "this policy" was to some date of reference from the Original Policy, to be found in the attachments from the Original Policy. In other words, appellant does not, in this case, have to look to the Original Policy for this purpose, nor does it ask that this be done. To the contrary, appellant contends that, when the appellee destroyed the Original Policy and removed from it the application and certain of its riders and endorsements and attached them to the Converted Policy, appellee thereby incorporated within the Converted Policy the date of reference from the Original Policy to be utilized in the Converted Policy as the date of commencement of the

suicide clause; and that appellee, by this reference thereby made the date of the attached application the commencement date of the suicide clause.

In support of the foregoing conclusions, it is interesting to note that the Converted Policy sets forth as its beneficiary "Eleanor S. Clark, wife, if living, etc." One of the attached endorsements antedating the Converted Policy by more than a year, dated December 18, 1959, provides in part as follows:

> "Change the beneficiary to executors, administrators or assigns of the insured."

Obviously, in attaching this endorsement, it was intended to change the beneficiary of the Converted Policy. In other words, the Converted Policy is treated for this purpose as if it had been in existence for more than a year prior to its date.

Why did not the appellee insurer attach the Original Policy to the Converted Policy? Why did it only attach the application and the other riders? If the Original Policy had been attached in its entirety it would have formed a part of the integrated contract and, presumably, furnished a specific date of reference for the suicide clause.

An examination of the Converted Policy demonstrates the evil inherent in this situation. If Clark, prior to suicide, had examined the Converted Policy in an attempt to determine when the two year suicide period would expire, he would have been unable to find a provision controlling that question. He did not have the Original Policy in his possession and there was no rider or endorsement attached to the Converted Policy that would shed any light on the issue. By reason of appellee's neglect and omission, he could not have determined his contractual rights

under the Converted Policy. Appellee, by its ineptness, created the problem and now seeks to benefit by it. The exclusion from liability could have been clearly stated and was not.

A somewhat similar factual situation was before this Court, in the case of *Horwitz vs. New York Life Ins. Co.,* (9 Cir., 1935) 80 F.2d 295. On January 6, 1933, an insurer commenced an action to cancel a policy of life and disability insurance. The question presented, among others, was whether or not the action had been commenced within two years "from its date of issue" within the meaning of the incontestability clause of the policy. The application, attached to the policy, was dated September 29, 1930. The policy was actually issued and dated January 7, 1931, and was delivered to the insured on January 14, 1931. The insurance company argued that the "date of issue" of the policy was January 7, 1931, within the two-year period in question. This Court rejected the argument of the insurer and held that for purposes of construing the incontestability clause, the policy's "date of issue" was September 29, 1930, the earliest possible date of reference under the policy. In reaching this conclusion, this Court noted, at page 298 of its opinion:

> "The insurance company contends that if there be any ambiguity in the term 'after two years from its date of issue' the usual rule of interpretation of a policy's provisions favorable to the insured does not apply, because the statute and not the act of the company's draftsman causes the ambiguity. We hold this contention without merit because it is apparent that it would be a 'substantial' compliance with the statutory requirement if the company had avoided the ambiguity involved in the words 'date of issue' by following them with the

words, to-wit 'from the date of application,' or the 'aniversary date of the policy,' or 'from the date on which it is purported on its face, to be signed,' or, 'the date of its issuance and receipt by the insured.' *The ambiguity arises from the act of the draftsman in so framing the policy that, under conditions likely to arise, a question of construction also arises as to which of the four cicrcumstances int he creation of the insurance contract fixes the 'date of issue.' We therefore hold that in resolving the doubt, if any, caused by the drafting of the policy it should be resolved in favor of the insured."* (Emphasis added)

A similar observation is particularly apropos of the Converted Policy. It is a converted policy, replacing a prior policy. The uncertainty or ambiguity arises from failure of the draftsman of the insurer, after converting the prior policy, to designate which of the four or five dates of reference in the creation of and conversion of the policy was to fix the "date on which this policy became effective" for purposes of the suicide clause. Resolution of this uncertainty in favor of the insured impels this Court to utilize for this purpose the earliest date of reference in the insurance transaction, which was December 1, 1959. *Narver vs. California State Life Ins. Co.,* (Cal., 1930) 294 Pac. 393, 395; *Brun vs. Northern Life Ins. Co.,* (1943) 16 Wn.2d 564, 570, 134 P.2d 84.

The Effective Date of an Insurance Policy Bears No Necessary Relationship to the Date of the Policy, the Date of Issue, the Date of Delivery or the Date of the First Premium Payment.

Neither the Converted Policy nor any of its attachments contains any provision which even re-

motely purports to establish or fix a date as of which the policy became effective for purposes of the suicide clause. This omission in and of itself constitutes a *per se* violation of R.C.W. Sec. 48.18.140(2)(d) which, as a matter of mandate, requires every policy of insurance to specify "The time at which the insurance thereunder takes effect . . .."

In this connection, Part 1 of the application dated December 1, 1959, (Ex. 1) attached to the Converted Policy, does contain a general negative statement as follows:

> "(2) The policy applied for shall not take effect until it has been manually received and accepted by the owner and the first premium paid thereon, and it shall then be effective only if there has been no change in the insurability of the proposed insured subsequent to the completion of this application."

Based on this provision, appellee contends that since the Original Policy was not delivered until December 18, 1959, the Converted Policy could not have taken effect for purposes of the suicide clause prior to December 18, 1959. Neither the date of issue nor the date of delivery of the Original Policy is set forth within the four corners of the Converted Policy and, accordingly parol evidence of these dates is inadmissible under the rule of integration heretofore discussed. However, it is submitted that even if such evidence were admissible, the significant questions would remain. Why was the Original Policy destroyed? What was intended by the attachment of the application for the Original Policy to the Converted Policy? The interjection of the date of issue and/or the date of delivery of the Original

Policy serves only to add to the uncertainty and confusion as to the date from which the suicide clause was intended to run. In any event, appellee's argument on this point is contrary to the overwhelming weight of established authority. The effective date of an insurance policy bears no *necessary* relationship to the date of the policy, the date of its issue, the date of its delivery, or the date of its first premium payment.

The landmark case in this area, from whence this rule has emanted, is *Mutual Life Ins. Co. vs. Hurni Packing Co.,* 263 U. S. 167, 44 S.Ct. 90, 68 L.Ed. 235 (1923), wherein a policy of life insurance was applied for on September 2, 1915, issued on September 7, and delivered on September 13. At the request of the insured, the policy itself was dated August 23, 1915. The policy contained a clause making it incontestable after "two years shall have elapsed from its date of issue". The insured died on July 4, 1917, and an action contesting the policy was commenced by the insurer on August 24, 1917. The Supreme Court of the United States held, in favor of the insured that, for purposes of construing the incontestable clause, the "date of issue" of the policy was August 23, 1915, the earliest date of reference under the insurance transaction in question. The court observed that the word "date" as used in written instruments does not ordinarily refer to the actual time that an event took place, but rather a time given or specified or in some way fixed in the instrument itself. As stated by the Court (263 U. S. at 175):

> "When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated

in the deed itself. The date of an item, or of a charge in a book account, is not neecssarily the time when the article charged was, in fact, furnished, but simply the time given or set down in the account, in connection with such charge . . . .

"Here the words referring to the written policy are 'from its date of issue.' While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated, that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of the actual execution of the policy, or the time of its delivery, but to the date of issue as specified in the policy itself."

From the foregoing, the Court concluded (263 U.S. 176):

"It was within the power of the Insurance Company, if it meant otherwise, to say so in plain terms. Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it."

That the term "date on which this policy became effective" as used in the suicide clause of the Converted Policy is not necessarily synonymous with the date of the policy itself, was recognized in *Cantrell vs. Prudential Insurance Co.,* (1937) 189 Wash. 99, 63 P.2d 509. In *Cantrell,* the insured applied for a policy of life insurance on January 23, 1931, and thereafter, a policy was issued, dated February 16, 1931, containing a suicide clause limiting the liability of the insurer in the event of suicide within "one year from date hereof". The insured committed suicide on February 12, 1932. On appeal, a

judgment for the insurance company was affirmed, the Court holding that the date of the policy as therein stated, i.e., February 16, 1931, was controlling for purposes of the suicide clause as the meaning of the two words "date hereof" as therein utilized, was definite and certain. However, in passing, the Court did note, at page 102 of its opinion:

> "Had the policy, in the case now before us, instead of using the words 'date hereof' used an expression such as 'date of issue' or 'date when the insurance became effective' a different question would be presented."

The so-called "different question" referred to in *Cantrell* was presented in *Schwartz vs. Northern Life Ins. Co.,* (9 Cir. 1928) 25 F. 2d 555, cert. den. 278 U.S. 628, 73 L.Ed. 547, 49 S.Ct. 29, wherein the question was whether the insured had committed suicide within one year from the date upon which the policy had become effective. In *Schwartz,* it was held that, for purposes of the suicide clause, the policy became effective on August 2, 1924, the date upon which the insurance was applied for and the insured took his medical examination, notwithstanding the fact that the policy was not issued, dated or delivered until August 14, 1924. This court rested its conclusion on the following rule, stated at page 557 of its opinion:

> "The principal question presented in this case is upon what date the policy became effective. The appellant says it was August 2, 1924. The appellee says it was August 14, 1924. *The date from which a policy becomes effective is not necessarily determined by the date of which it bears or the date of its execution or the date of its delivery or by the date when the first premium is paid. It is the date from which the*

> *risk commenced, and it is determined by the meaning of the provisions of the insurance contract.*" (Emphasis added)

Similarly, in *New York Life Ins. Co. vs. Cohen,* (N.D. Ohio, 1930) 48 F.2d 903, the application for insurance, attached to the policies in question, provided that the insurance applied for should not take effect unless and until the policies were delivered to and received by the applicant and the first premium thereon paid in full, and then only if the applicant had not consulted or been treated by any physician since his medical examination. The insurer, in an action to cancel the policies, argued that as the applicant had consulted a physician on July 19, 1928, and the policies had not been delivered until the next day, July 20th, they had not, by their terms, become effective. The Court construed the policy in favor of the insured and held that the policies had become effective in accordance with their terms on July 6, 1928, notwithstanding the provision in the application, stating at page 905:

> "The condition of the application that the insurance shall not take effect unless the policies be delivered, and the first premiums paid during Cohen's lifetime, is not inconsistent with anything in the policies. *It imports no time, and, so far as it was concerned, if delivery and the payments were made, the insurance would go into effect at any time agreed upon by the parties.*" (Emphasis added)

Thus, the fact that the existence of the insurance contract between the parties is expressly conditioned in the application upon delivery of the policy and payment of the premium does not establish the effective date of the insurance for purposes of the policy. As stated in *Cohen,* supra, at page 907:

> "As there is a distinction between an insurance contract coming into existence, and the taking effect of the insurance provided for in the contract, there is no warrant to hold they mean the same thing; and such construction is not permissible."

This specific question was again presented in *Travelers Ins. Co. vs. Wolfe,* (6 Cir., 1935) 78 F.2d 78, cert. den. 296 U.S. 635, 80 L.Ed. 452, 56 S.Ct. 158. In that case, the application contained a provision similar to the one in the Converted Policy and the policy in question was not delivered to the insured nor the first premium paid thereon until October 20, 1927. The Court held, on a question of lapse of policy for non-payment of premiums, that notwithstanding such provision, the policy became effective on October 3, 1927, as stated in the policy itself.

In *Shira vs. New York Life Ins. Co.,* (10 Cir., 1937) 90 F.2d 953, the insured executed an application for insurance on October 28, 1929, containing a provision conditioning the insurance upon delivery of the policy and payment of the first premium. The insurer was unwilling to issue the policy applied for and on January 7, 1930, the insured executed an amended application as a result of which a policy, dated January 7, 1930, was issued and delivered on January 16, 1930. It was held that, notwithstanding the provision in the application, the policy became effective on January 2, 1930, in accordance with its terms, the court stating at page 955 of its opinion:

> "The provision in the application does not fix the effective date of the insurance contract. It simply imposes a condition precedent to the taking effect of the insurance coverage."

As has been observed by several of the courts

presented with the question, only confusion and uncertainty could result from allowing parol evidence or testimony of delivery of a policy to establish any particular date affecting the respective rights of the parties under the policy. *Kurth vs. National Life & Accident Ins. Co.,* (Tex., 1935) 79 S.W.2d 338, 340; *Pladwell vs. Travelers' Ins. Co.,* (1928) 234 N.Y.S. 287, 291; *Reid vs. Bankers Life Co.,* (Neb., 1947) 28 N.W.2d 542, 547; *Sellars vs. Continental Life Ins. Co.,* (4 Cir., 1929) 30 F.2d 42, 44; *Cantey vs. Philadelphia Life Ins. Co.,* (S.C., 1932) 164 S.E. 609, 611. As stated in *Reid,* supra, at page 547:

> "Varying reasons are given by courts adopting the majority rule, chief of which is that effective dates of policies and premium due dates should be definitely fixed by binding written contracts rather than determinable after loss at the caprice of parol testimony of doubtful veracity, thereby permitting the avoidance or destruction of plain contractual provisions and undermining their actuarial foundations, the fundamental basis of all insurance."

A like observation is found in *Cantey,* supra, at page 611:

> "There must be a certainty in such dates, else there would be a controversy in every such case as this growing out of the uncertainly of the date of delivery of the policy. It might not be possible to prove the date of delivery; the agent and the insured both being dead. Then resort must be had to conjecture as in this case."

The evil inherent in any contrary rule is illustrated in *Allick vs. Columbian Protective Ass'n.,* N.Y., 1945) 55 N.Y.S.2d 438, aff'd 64 N.E.2d 350, wherein an application for insurance contained a provision, as in this case, that the policy in question

was not to become effective until delivered to the insured in good health. Based upon this provision, the insurer argued, unsuccessfully, that since the insured was not in good health when the policy was delivered to her, the policy, including the incontestable clause, never became effective, notwithstanding the fact that the insured had paid and the insurer had accepted premiums beyond the period of incontestability.

The foregoing authorities establish beyond argument that the effective date of an insurance policy is not controlled by and bears no necessary relationship to the date of the policy, the date of its issuance, the date of its delivery or the date upon which the first premium was paid. This, appellant submits, is particularly true when, as here, the policy in question is a converted policy, containing riders and endorsements with several dates of reference relating to the insurance contract which antedate the policy itself. It necessarily follows, therefore, that there is no good reason for this Court, as a matter of construction, to utilize any date suggested by the appellee as the date upon which the Converted Policy became effective, to defeat the insurance coverage. To the contrary, established rules of construction require this Court to utilize as such effective date the earliest date of reference in the insurance transaction between Clark and the appellee, which was December 1, 1959.

Authority for such a determination is found in the case of *Brun vs. Northern Life Ins. Co.,* (1943) 16 Wn.2d 564, 134 P.2d 84. In *Brun,* the insured, in a single application, applied for a life policy and an accident policy and, at the time of application, paid the agent $6.81 as the first monthly premium for

the two policies. The application provided "Annual Premium $75.64 payable in twelve installments of $6.81 each". Thereafter, on August 6, 1940, the policies in question were issued.

On October 8, 1940, the insurer wrote a letter to the insured, claiming past due premiums for the months of September and October of $13.62; and, in response thereto, on October 9, 1940, the insured remitted a check to the insurer in the sum of $6.81 with instruction to apply the same to the September installment. Thereafter, on November 28, 1940, the insured came to his death as the result of an accident.

In an action by the beneficiary to recover the face amount o fthe two policies, the insurer defended on the ground that the same had lapsed for non-payment of premiums. The insurer argued that as the premium payment due on October 1, 1940, had not been paid, the policies in question had lapsed upon the expiration of a grace period of 31 days thereafter. In other words, the insurer's argument arbitrarily assumed that the premium payments were due in advance on the first day of each month.

Preliminarily, the Court observed, at page 570 of its opinion:

> "The provision in the application as to the times of payments of premiums is not ambiguous. It is, however, incomplete, in that it does not set forth a date in each month when the monthly installment of premiums shall be paid, and it is neecssary that the court construe this provision."

The Court then rejected the insurer's arbitrary premise and concluded, at page 569 of its opinion:

> *". . . that, as no time was provided as to the date of each monthly payment, the insured had*

until the last day of each month within which to make the payment for that current month."

There is a marked similarity between *Brun* and the instant case. In this case, as in *Brun,* a date determinative of the rights of the parties is missing from the policy of insurance. In this case, as in *Brun,* the court has been requested by the insurer to arbitrarily supply as such missing date, a date which would defeat the insurance. In this case, as in *Brun,* the court should reject such request and, as a matter of construction, determine such missing date to be that date which, under the insurance transaction between the parties, is most favorable to the insured.

Based on the foregoing, appellant submits the *Brun* case as authority in support of its contention that, *for purposes of construing the suicide clause in the Converted Policy,* this court should determine that the Converted Policy became effective as of the date of Clark's written Application for insurance on December 1, 1959.

Appellant further submits that as Clark's suicide on December 7, 1961, occurred more than two years from such date of December 1, 1959, the Converted Policy suicide clause is inapplicable to restrict or limit appellee's liability to appellant for the full amount of the Converted Policy.

IN THE ALTERNATIVE APPELLANT SUBMITS THAT THE SUICIDE CLAUSE OF THE CONVERTED POLICY IS UNENFORCEABLE UNDER THE INSURANCE CODE OF THE STATE OF WASHINGTON

In the alternative, appellant submits that the suicide clause as contained in the Converted Policy

is completely unenforceable under The Insurance Code of the State of Washington.

Under The Insurance Code, no form of insurance policy may be issued or used in the State of Washington unless it has been filed with and approved by the Insurance Commissioner. R.C.W. Sec. 48.18.100(1). In turn, the Commissioner is under a duty to disapprove any form of policy which does not comply with The Insurance Code in any respect, or which contains any inconsistent, ambiguous or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract. R.C.W. Sec. 48.18.110(1)(a)(c). As stated in *Kearns vs. Penn. Mutual Life Ins. Co.*, (1934) 178 Wash. 235, 34 P.2d 888, at page 247:

> "It is the duty of the insurance commissioner to examine all forms of life insurance policies proposed to be issued in this state and to disapprove the use of any which are not in compliance with the statutory provisions for a standard life insurance policy."

The portions of The Insurance Code relating to such standard provisions are set forth in Appendix A hereof.

Specifically, with respect to the insurer's right to limit its liability in the event of suicide, R.C.W. 48.23.260 of The Insurance Code provides as follows, under the heading "Limitation of liability":

> "(1) The insurer may in any life insurance policy * * * limit its liability to a determinable amount not less than the full reserve of the policy and of dividend additions thereto in event only of death occurring:
>
> (a) . . . .
>
> (b) As a result of cuicide of the insured,

whether sane or insane, within two years from date of issue of the policy.

(c) . . . .

(2) An insurer may specify conditions pertaining to the items of subsection (1) of this section which in the commissioner's opinion are more favorable to the policyholder."

Under the foregoing statutes, it would appear clear that an insurer under a life insurance policy is allowed, *but is not required,* to limit its liability *only* in the event of death by suicide occurring "within two years from *date of issue* of the policy." It is equally as clear that the suicide clause employed by the appellee insurer in the Converted Policy does not conform to this permissive standard provision; that is to say, under the Converted Policy, the appellee purported to limit its liability in the event of suicide occurring (a) within two years of the *date on which this policy became effective,* rather than (b) within two years from the *date of issue of the policy.*

This departure from the statutory language in and of itself confuses the meaning of the Converted Policy suicide clause. As demonstrated in the foregoing sections hereof, the date of issue of a policy bears no necessary relationship to the date on which it may have become effective.

However, in such case there is a presumption that the Insurance Commissioner of the State of Washington properly discharged the duties of his office. 43 *Am. Jur.* 254, *Public Officers,* Sec. 511; 20 *Am. Jur.* 174, *Evidence,* Sec. 170. Accordingly, as the Insurance Commissioner approved the form of the Converted Policy (Ex. A-8), he must have determined in accordance with R.C.W. Sec. 48.23.260(2)

hat its non-conforming suicide clause was more avorable to the insured than the standard form. Kocak vs. Metropolitan Life Ins. Co., (N.Y., 1933) 63 N.Y.S. 283, 286. In fact, appellant submits that ppellee is estopped from denying that the non-con-orming suicide clause in the Converted Policy is nore favorable to the insured than the standard orm. *Ambrose vs. Acacia Mut. Life Ins. Co.,* (Va., 949) 56 S.E.2d 372, 375. From this, it necessarily ollows that, as suggested in the preceding sections ereof, the Converted Policy must be held to have ecome effective prior to its "date of issue". Appel-int is entitled to the benefit of this most favorable onstruction of the non-conforming suicide clause nd the appellee, as a matter of contract, is bound o such construction. *Kocak vs. Metropolitan Life ns. Co.,* (N.Y., 1933) 263 N.Y.S. 283, 287; *American atl. Ins. Co. vs. Tabor,* (Texas, 1921) 230 S.W. 397, 99; *Metropolitan Life Ins. Co. vs. Consento,* (Ill., 938) 17 N.E.2d 1019, 1022; *Ambrose vs. Acacia lut. Life Ins. Co.,* (Va., 1949) 56 S.E.2d 372, 375; *onte vs. Yorkshire Ins. Co. of N.Y.,* (N.Y., 1957) 33 N.Y.S.2d 28; *Northern Life Ins. Co. vs. Christie,* 1934) 179 Wash. 88, 94, 36 P.2d 73; *Policyholder's at. Life Ins. Co. vs. Harding* (8 Cir., 1945) 147 .2d 851. As stated in *Malanti vs. Metropolitan Life. ns. Co.,* (N.Y., 1926) 216 N.Y.S. 643, at 644:

> "The policy here involved was the contract between the parties, and the defendant company saw fit to depart from the form prescribed by the Legislature. If the construction that I place upon the clause in the contract be correct, it inures to the benefit of the insured, and necessarily was an inducement to the insured to make the contract. If there be any ambiguity, that construction is to be adopted which is most

favorable to the insured * * * though that would not be so if the form prescribed by statute had been followed."

This line of authority, of course, buttresses appellant's initial argument that, as a matter of construction, the Converted Policy became effective for purposes of its suicide clause, on December 1 1959.

If Appellee's Construction of the Converted Policy Is Adopted, Then the Entire Suicide Clause Is Illegal and Unenforceable.

However, even if we assume, solely for purposes of the argument, that, as contended by appellee (Pre. Tr. Ord. Def. Cont. 4, Clk. R. 53) the Converted Policy was not delivered and did not become effective until December 18, 1959, then, obviously, appellee's deliberate utilization of the date on which the policy became effective rather than its date of issue as the commencement date of the suicide clause served to extend such exclusion beyond the period permitted by the standard form. In other words under appellee's construction of the Converted Policy, the suicide exclusion would not expire until two years and seven days from the date of issue. Appellant submits, as an alternative argument herein that this renders the entire suicide exclusion illegal and unenforceable.

This particular issue is fairly unique. However it is well established (i) that an insurer may not broaden or extend any permissive standard exclusion to the detriment of the insured; *Shank vs. Fidelity Mut. Life Ins. Co.,* (Minn., 1945) 21 N.W.2d 235; *Onstad vs. State Mut. Life Assur. Co.,* (Minn.

948) 32 N.W.2d 185; *National Life & Casualty Co. s. Blankenbiller,* (Ariz., 1961) 360 P.2d 1030, 1032; *Nordin vs. Commercial Casualty Ins. Co.,* (1934) 76 Wash. 59, 28 P.2d 259; and (ii) that the Insurance Commissioner has no power or authority to approve any policy provision which is less favorable to he insured than the statutory standard provision. *Shank vs. Fidelity Mut. Life Ins. Co.,* supra; *Onstad s. State Mut. Life Assur. Co.,* supra; 29 *Am. Jur.* 71, 472, *Insurance,* Sec. 54. See also: *Massachusetts Mutual Life Ins. Co. vs. Thatcher,* (1961) 222 N.Y.S. d 339.

It necessarily follows with respect to suicide lauses in particular that, as stated by the Commentator in 9 A.L.R.2d 1436 at 1463:

> ". . . a statute providing that suicide shall not be a defense in an action on a life insurance policy, *except in certain cases,* cannot be waived, being a part of the declared public policy of the enacting jurisdiction." (Emphasis added)

In support of this contention appellant relies, specifically, upon the case of *Shank vs. Fidelity Mut. Life Ins. Co.,* (Minn., 1945) 21 N.W.2d 235, which, although not concerned with suicide, does adopt the rule which appellant submits should be followed in his case.

In *Shank,* a 20-year Endowment policy was issued by an insurer to an airline pilot, containing an aviation exclusion providing:

> ". . . that in the event of the death of the insured directly or indirectly as the result of *service, travel* or *flight* in any species of aircraft, except while riding as a fare-paying passenger in a licensed commercial air-craft * * * the liability of the Company to the beneficiary shall be limited to an amount equal to the re-

serve on this policy less any indebtedness hereon." (Emphasis added)

Under The Insurance Code of the State of Minnesota an insurer was authorized but not required when insuring the life of a person engaged in an extra hazardous occupation, to limit its liability to an amount not less than the policy reserve in the event of the insured's death through *service* in that occupation.

Thereafter, Shank met his death in a crash of his aircraft. In an action by his beneficiary to recover the face amount of the policy the trial court held that as Shank had met his death as a result of *service* in an aircraft the insurer's liability was limited to the policy reserve. The Supreme Court of Minnesota reversed and held that the insurer's attempt to extend the standard permissive exclusion, (death from *service*) to include death from travel or flight, was completely ineffective and served to void the entire exclusion. Initially, the Court observed (21 N.W.2d at p. 237):

"The effect of the insertion by Defendant of the unauthorized words 'travel or flight' in the rider or endorsement is the question which confronts us. Plaintiff argues that the words 'travel or flight' make the endorsement completely void, or contrary to the statutes of this State, and that she is therefore entitled to recover the face amount of the policy. In addition to claiming that the words *'service, travel or flight'* are ejusdem generis, Defendant contends that the

words are severable, and that, since death resulted from service, the endorsement is valid and the words 'travel or flight' mere surplusage that may and should be ignored."

The Court then specifically rejected defendant's contention and held that the insurer's attempt to expand the exclusion beyond the limits permitted by statute served to taint the entire exclusion in such manner as to render the same unenforceable. The Court directed entry of judgment for plaintiff in the face amount of the policy, stating, at page 239 of its opinion:

> "The rider was issued in violation of a legislative act which specifies the provisions which must be contained in a policy of life insurance. It therefore offended the public policy of this state. In our view, the entire rider or endorsement is tainted with illegality and is void."

For the reasons set forth in the *Shank* case, supra, appellant submits that the suicide clause utilized by appellee in the Converted Policy violated Sec. 48.23.260(1)(b) of The Insurance Code of the State of Washington and was void *ab initio*. Cf: *Nordin vs. Commercial Casualty Ins. Co.,* (1934) 176 Wash. 9, 28 P.2d 259. Appellee's liability to appellant for the full face amount of the Converted Policy should be enforced without regard to said ineffectual clause.

CONCLUSION

For the foregoing reasons and on the authorities cited, it is respectfully submitted that the Judg-

ment of Dismissal (Clk. R. 66) heretofore entere
should be reversed with directions to enter a judg
ment for appellant and against appellee in accord
ance with the prayer of appellant's Complaint (Clk
R. 4) in the sum of $288,017.52, together with inter
est thereon.

Respectfully submitted,
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& ROSENQUIST
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APPENDIX A

Provisions of the Insurance Code of the State of Washington Relating to Standard Provisions of Insurance Contracts

"**R.C.W. 48.18.130 Standard provisions.** (1) Insurance contracts shall contain such standard provisions as are required by the applicable chapters of this code pertaining to contracts of particular kinds of insurance. The commissioner may waive the required use of a particular standard provision in a particular insurance contract form if

(a) he finds such provision unnecessary for the protection of the insured, and inconsistent with the purposes of the contract, and

(b) the contract is otherwise approved by him.

(2) No insurance contract shall contain any provision inconsistent with or contradictory to any such standard provision used or required to be used, but the commissioner may * * * approve any provision which is in his opinion more favorable to the insured than the standard provision or optional standard provision otherwise required. No endorsement, rider, or other documents attached to such contract shall vary, extend, or in any respect conflict with any such standard provision, or with any modification thereof so approved by the commissioner as being more favorable to the insured.

(3) In lieu of the standard provision required by this code for contracts for particular kinds of insurance, substantially similar standard provisions required by the law of a foreign or alien insurer's domicile may be used when approved by the commissioner."

"**R.C.W. 48.18.510 Validity of noncomplying forms.**

Any insurance policy, rider, or endorsement here after issued and otherwise valid, which contain any condition or provision not in compliance with the requirements of this code, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code."

"R.C.W. 48.23.020 **Standard provisions required—Life insurance.** (1) No policy of life insurance * * shall be delivered or issued for delivery in this state unless is contains in substance all of the provisions required by RCW 48.23.030 to 48.23.130, inclusive . . . ."

"R.C.W. 48.23.050 **Incontestability.** There shall be a provision that the policy shall be incontestable after it has been inforce during the lifetime of the insured for a period of two years from its date of issue, except for nonpayment of premiums . . . ."

APPENDIX B

Table of Exhibits

At the trial of this case on November 29, 1965, the following Exhibits were identified and offered in evidence by the appellant and the appellee and admitted in evidence by the trial court:

Exhibit No.	Description	Record
1	Part I and Part II of Application to The Crown Life Insurance Company to issue a policy of insurance in the amount of $300,000 on the life of Charles M. Clark, dated December 1, 1959.	R.2

Exhibit No.	Description	Record
2	Policy of Life Insurance No. 835,907 dated March 8, 1961, issued by The Crown Life Insurance Company insuring the life of Charles M. Clark in the sum of $300,000, with attachments thereto.	R.2
3	Life Insurance Trust Agreement dated August 18, 1961.	R.2
4	Proof of Claim dated September 18, 1962, submitted by appellant to appellee for the death benefits under Exhibit 2.	R.2
A-1	Appellee's Master Record Sheet (Form 70 A-2), Policy No. 835,-907, on life of Charles M. Clark.	R.4-7
A-2	Appellee's Premium Card, Policy No. 835,907.	R.9-10
A-3	Change of Beneficiary Form, Policy No. 835,907, dated September 6, 1961.	R.15
A-4	Request for Change in Policy, Policy No. 835,907 dated May 16, 1961.	R.15-16
A-5	Request for Change in Policy, Policy No. 835,907, dated February 28, 1961.	R.16
A-6	Cancelled check dated December 18, 1959, drawn by Charles M. Clark and payable to the order of Crown Life Insurance Co., in the sum of $3,586.50.	R.17
A-7	Certificate No. 18955 of Lee I. Kueckelhan, Insurance Commis-	R.21

Exhibit No.	Description	Record
	sioner of the State of Washington, re Policy Form H122 of The Crown Life Insurance Company.	
A-8	Certificate No. 18958 of Lee I. Kueckelhan, Insurance Commissioner of the State of Washington, re Policy Form H162 of The Crown Life Insurance Company.	R.21-22
A-9	Duplicate copy of Original Policy No. 835,907, dated December 11, 1959.	R.10-14
A-10	Appellee's Cash Receipt dated December 18, 1959.	R.16-17, 20-21

CERTIFICATE OF ATTORNEY PREPARING OPENING BRIEF OF APPELLANT

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM R. SMITH
Attorney